

March 7, 2003

VIA FACSIMILE; ORIGINAL TO BE MAILED

Ms. Carol Sureau
Deputy Commissioner for Legal Affairs
Office of the Insurance Commissioner
State of Washington
P.O. Box 40255
Olympia, WA 98504-0255

Re: Docket No. G02-45
In re Premera Blue Cross and Affiliates

Dear Deputy Commissioner Sureau:

At the pre-hearing conference held on Monday, March 3, 2003, Mr. Kelly apprised the Commissioner of the parties' joint proposal regarding the appointment of a Special Master. With respect to the question of compensation, Mr. Kelly said that Premera would no longer insist that the Special Master's time be charged to the Intervenors where the Intervenors failed to prevail on a question brought before the Special Master. Rather, Premera volunteered to bear the costs of the Special Master under all circumstances. Mr. Kelly proposed, however, that the Special Master be authorized to award the prevailing party (whether Premera or Intervenors) its fees and costs if the position of the opposing party (either Premera or Intervenors) were found to be lacking substantial merit.

In his response, Mr. Hamje observed that such authority on the part of the Special Master would require the consent of all parties, inasmuch as he believed there was no basis for awarding sanctions in an administrative proceeding. Ms. Hamburger, speaking on behalf of the Intervenors, said that they would not agree to granting such authority, although she assured the Commissioner that the Intervenors would not take frivolous positions before the Special Master.

To be fair to Mr. Hamje and Ms. Hamburger, they did not have time to consider Mr. Kelly's proposal in depth before speaking about it at the pre-hearing conference. Nevertheless, we believe that substantial authority does exist for a Special Master in a case such as this to control the behavior of persons appearing before the Special Master by having the discretion to award fees and costs. The Holding Company Acts provide that the applicant, the OIC, and persons whose significant interest is determined by the Commissioner to be affected "may conduct discovery proceedings in the same manner as is allowed in the superior court of this

state.” RCW 48.31B.015(4)(b); RCW 48.31C.030(4). The rules for superior court specifically contemplate awards of fees and expenses in connection with discovery motions. Civil Rule 37(a)(4) provides as follows:

If the motion [to compel discovery] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In raising this point we do not, in any way, wish to obscure the fundamental agreement of the parties and the Intervenor on the need for a Special Master, the appropriate candidates for that position, and the procedures to be followed in bringing matters before the Special Master. We believe, however, that substantial authority supports Premera’s request that the Special Master have discretion to award fees and costs in circumstances where someone appearing before the Special Master is taking an unjustified position. We believe that granting such discretion will have a salutary effect upon the persons participating in this case and will help to ensure that the costs imposed upon or assumed by Premera are limited to those which are “reasonably necessary to assist the commissioner in reviewing the proposed acquisition of control.” RCW 48.31C.030(5)(b).

Very truly yours,

PRESTON GATES & ELLIS LLP

By
Robert B. Mitchell

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cc: John F. Hamje
Eleanor Hamburger
Michael Madden
Jeffrey Coopersmith
Dina Yunker
Amy McCullough
Thomas E. Kelly, Jr.

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